United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

PETITION FOR REHEARING

362

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 22,345

UNITED STATES OF AMERICA,

Appellee,

vs.

ARCHIE BLYTHER, JR.

Appellant.

On Appeal From
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Peter N. Lalos
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Washington, D. C. 20036

Attorney for Appellant
(Appointed By This Court)

PETITION FOR REHEARING

The appellant, Archie Blyther, Jr., respectfully petitions this Court to grant a rehearing with respect to its decision of November 20, 1970, holding that no plain error affecting substantial rights exists justifying the Court to exercise its discretionary authority under Rule 52(b) to pass on Blyther's previously unraised objection to seizure of the pistols admitted into evidence, and affirming the conviction of Blyther for the offense of carrying an unlicensed pistol in violation of D. C. Code 22-3204.

In its decision finding no plain error affecting substantial rights which would warrant the Court's consideration of Blyther's previously unraised objection to seizure of the pistols, the Court cited Fuller v. United States, 132 U. S. App. 264, 279-80, 47 F.2d 1199, 1214-15 (1967), presumably as controlling. A careful review of the Fuller decision, however, suggests that this Court's decision on whether or not there is plain error affecting substantial rights, which would prompt the Court in exercising its discretionary authority to consider on the merits a previously unraised objection to the admission of evidence obtained through a search, is predicated on a consideration of the nature of all the evidence supporting a conviction, and a determination of the merits of the seizure in question.

In the Fuller case, the evidence supporting the conviction consisted of three separate confessions of the defendant, and certain clothing of the defendant obtained in a search of his premises, linking the defendant to the scene of the crime. This Court finding the three separate confessions apart from the evidence obtained in the search objected to, as sufficient to support the conviction, and further finding in a determination of the merits that the search objected to was lawful, understandably found no plain error affecting substantial rights which would justify the Court in exercising its discretionary authority to pass on the previously unraised objection to the seizure of the defendant's clothing.

Applying the same criteria as suggested in the Fuller case, i.e., a consideration of the nature of all the evidence and a determination of the merits of the previously unraised objection, to the set of facts in the present case, urges a finding contrary to the finding reached in the Fuller case, specifically that there exists a plain error affecting substantial rights which the Court should pass on. Considering first the nature of all the evidence supporting Blyther's conviction for the offense of carrying a dangerous weapon without a license, it is to be noted that the only evidence supporting the conviction consists of the weapons found in the search and the testimony of the arresting officers concerning such search. No other evidence exists upon which the Government may support the conviction of Blyther, as it did in the Fuller case.

Next, considering the merits of the question of unlawful seizure raised by Blyther, it is contended that the search producing the evidence which constitutes the crux of the Government's case, cannot be justified under any accepted theory. More specifically, considering the lawfulness of the seizure in question, it would appear that a determination of the lawfulness of the seizure requires first a characterization of the restriction of freedom of the movement of Clements and Blyther which occured when Officer Neer grabbed the door handle of the vehicle in which they were seated to prevent the departure of Clements from the vehicle, either as an arrest or merely a detention. In this respect, Blyther contends that the restriction of freedom of movement of Clements and Blyther, and physically of Clements, constitutes an arrest under the authority of Henry v. United States as previously discussed. Assuming that such a restriction constitutes an arrest, the next question raised is whether or not the arrest was lawful. In this regard, it is submitted that such an arrest would be lawful only if the arresting officer had obtained an arrest warrant or had reasonable or probable cause to believe that a crime had been committed. Since there is no evidence of any arrest warrant having issued, the arrest would be lawful only if there can be shown to be evidence of reasonable or probable cause that a crime has been committed. Since there is no evidence that Officer Neer had any reasonable or probable cause to believe that a crime had been committed when he first accosted Blyther and Clements seated in their car in an alley, the arrest was unlawful and, consequently, the search incidental to the

unlawful arrest also was unlawful, and the evidence obtained during the unlawful search is inadmissible in evidence. In this regard, it is to be noted that an arrest cannot be justified by any evidence disclosed by a search following the arrest. Johnson v. United States 333 U. S. 10, (1968).

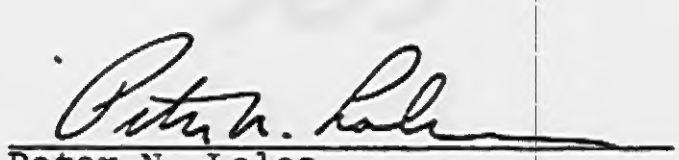
The Government has alluded to a traffic offense, i.e., illegal parking in an alley, as reasonable or probable cause which would justify an arrest of Blyther and Clements under the present circumstances. However, assuming the restriction of the freedom of movement of Blyther and Clements constituted a lawful arrest for such a traffic offense, the question is raised as to whether the search following the arrest for a traffic offense was proper as incidental to the arrest. In this regard, it is well settled that a search is lawful only for the purpose of seizing the instrumentalities and other evidence of a crime for which an arrest is made, to prevent its destruction or concealment, or removing any weapons which the arrestee might seek to use to resist or effect escape. Chimel v. California 395 U. S. 752, (1969). Since for most traffic offenses no search of the arrestee for evidence may be allowed at all because no evidence exists to be found, it is submitted that the search following the assumed arrest for illegal parking of the vehicle occupied by Clements and Blyther, is unlawful. United States v. Robinson _____ U.S. App. D. C. _____, _____ F.2d _____ (1970).

Assuming the restriction of the freedom of movement of Clements and Blyther did not constitute an arrest but merely a detention, the search incidental to the detention was lawful only if it can be shown that at the time that Officer Neer accosted Clements and Blyther seated in their vehicle, he reasonably believed that criminal activity was afoot and that he was apprehensive for his own safety or the safety of others. Terry v. Ohio 392 U. S. 1 (1968). However, since there is no evidence of Officer Neer reasonably believing that criminal activity was afoot or of him having been apprehensive for his own safety or the safety of others which would justify a search of the outer clothing of the appellants, and since the search in question exceeded the search of the outer clothing of Clements and Blyther, it is submitted that the search further cannot be justified under Terry.

Accordingly, applying the same criteria applied by this Court in the Fuller case, and considering that the conviction of Blyther cannot be supported on any evidence but that obtained by means of the seizure in question, and there being no justification of the search in question under any accepted theory, considering the merits of the search, it would appear that plain error of substantial rights is present in the instant case, not only justifying the Court in exercising its discretionary authority in finding plain error, but further finding that the search in question was unlawful upon a consideration of the merits.

For the foregoing reasons, it respectfully is submitted that this petition for rehearing should be granted.

Respectfully submitted,



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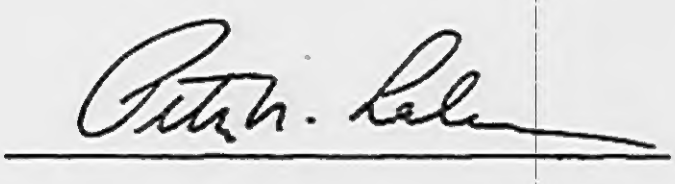
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing was served personally at the office of the United States Attorney, United States District Courthouse, Washington, D. C. this 17th day of December, 1970.



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VI. Whether the trial court erred in refusing to grant appellant Blyther's motion for judgment of acquittal.

The pending case has not been previously before this Court under the same or similar title.

STATEMENT OF THE CASE

Appellant Archie Blyther, Jr. and Emanuel Clemmons were indicted on separate counts for carrying a dangerous weapon in violation of Title 22, District of Columbia Code, Section 3204. Both defendants were tried together in Criminal Action No. 1550-67 and both were found guilty. On the grounds of a prior conviction for a felony, a sentence of 2-6 years was imposed on appellant Blyther, who has been committed and is now serving sentence. In view of the fact that this appeal and appeal No. 22,344 involving Emanuel Clemmons arose from the same indictment and trial in the District Court, this Court ordered the consolidation of the appeals of the two parties.

The trial of Criminal Action No. 1550-67 was conducted on Thursday, June 6, 1968, Friday, June 7, 1968 and the following Monday, June 10, 1968. The Government's case consisted of the testimony of Officer Robert E. Neer and Officer Kenneth Marshall, the arresting officers, and certain weapons and ammunition seized during the arrest of the defendant. Appellant Blyther elected to take the stand and testify while Emanuel Clemmons elected to stand mute. Neither of the defendants presented any other witnesses.

Officer Neer testified that on September 29, 1967 at about 8:30 p.m. he had occasion to be in the vicinity of an alley in the rear of 312 Twelfth Street, S.E., in the City of Washington, where he observed a parked vehicle. He entered the alley in which the vehicle was parked and positioned his vehicle directly in front of the parked vehicle with his headlights on. He also directed the spotlight of his vehicle into the middle of the windshield of the parked vehicle. (Tr. 6-24)[1/] At the time, he observed Emanuel Clemmons sitting behind the steering wheel of the parked vehicle, Tr. 6-25) appellant Blyther sitting in the middle of the front seat of the parked vehicle and a third person outside of the right side of the parked vehicle where the door was open. (Tr.6-26) Officer Neer stated that he got out of his vehicle, walked across the front of the two vehicles and approached the lefthand side or driver's side of the parked vehicle. (Tr. 6-26, 6-45) As he approached the left side of the parked vehicle the left door started to open, at which time Officer Neer grabbed the door handle maintaining control of the door and opened the door. (Tr. 6-26, 6-27, 6-48) Upon opening the door, Officer Neer observed a revolver lying on the floor immediately at the feet of Emanuel Clemmons. He

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1/ Throughout this brief, prefixes 6, 7 and 10 denote the separate transcripts of the trial proceedings for June 6, 7 and 10, respectively.

then ordered Emanuel Clemmons and appellant Blyther out of the parked vehicle and commenced searching Emanuel Clemmons. (Tr. 6-27, 6-48) In patting down Emanuel Clemmons, Officer Neer found on his person a 32-20 caliber Winchester ammunition box, twenty-four 32-20 caliber brass shells in his jacket and nine extra rounds of 32-20 caliber brass ammunition which were retrieved from his pants pocket. (Tr. 6-28)

When Officer Neer first entered the alley and observed the parked vehicle, he radioed for assistance. (Tr.6-49) The assistance arrived as he was patting down Emanuel Clemmons. The first officer to arrive on the scene after Officer Neer was Officer Kenneth Marshall. (Tr. 6-42) Subsequently, additional assistance arrived on the scene, including a patrol wagon. Emanuel Clemmons, appellant Blyther, and the third person found standing near the parked vehicle, identified as Rudolph Clemmons, were placed in the patrol wagon. (Tr.7-8) After appellant Blyther and the others were placed in the patrol wagon, Officer Neer conducted a further investigation of the parked vehicle and found a fully loaded 32-20 caliber pistol on the floor of the driver's side of the vehicle (Tr. 6-29) and a fully loaded 32-20 caliber pistol on the floor on the right side of the parked vehicle. (Tr.6-29)

The Government's Exhibit 1-A was identified by Officer Neer as the revolver which he removed from the left side of the parked vehicle. (Tr.6-31) Government's Exhibit 1-B was identified by Officer Neer as the box containing the ammunition which was removed from the right jacket pocket of Emanuel Clemmons. (Tr. 6-31) Government's Exhibit 2-A was identified by Officer Neer as the revolver removed from the right side of the parked vehicle and Government's Exhibit 2-B was identified by Officer Neer as a box containing the six shells removed from one of the revolvers. (Tr. 6-32) The Government's Exhibits 1-A, 1-B, 2-A and 2-B were offered and received in evidence. (Tr. 7-20)

Officer Neer further stated that he observed Emanuel Clemmons and appellant Blyther approximately thirty to sixty seconds before ordering them to get out of the parked vehicle. (Tr. 6-39) He further testified that when he first approached the driver's side of the parked vehicle, the lefthand door was partially open and at that point he grabbed the door handle and opened the door, exposing the weapon which was lying at the feet of Emanuel Clemmons. (Tr. 6-47, 6-48) Upon observing the revolver lying at the feet of Emanuel Clemmons, Officer Neer drew his service revolver and ordered Emanuel Clemmons and appellant Blyther out of the parked vehicle. (Tr.6-48) It also was stated by Officer Neer that when he

arrived on the left side of the parked vehicle and the door on the lefthand side of the parked vehicle began opening, he grabbed the door to prevent Emanuel Clemmons from leaving the car. (Tr. 6-60)

Officer Marshall testified that he received a radio call at approximately 8:30 to 8:31 p.m. to proceed to the scene of the parked vehicle and arrived on the scene approximately a minute later. (Tr. 7-13) When he arrived at the location of the parked vehicle he noticed Officer Neer patting down Emanuel Clemmons. He then proceeded to pat down appellant Blyther and Rudolph Clemmons, but found no weapons on them. (Tr. 7-8) After patting Blyther and Clemmons down, the patrol wagon arrived and Officer Marshall assisted by other policemen placed appellant Blyther and the others in the patrol wagon. (Tr. 7-8) He then returned to the parked vehicle, whereupon, Officer Neer stated to him "Look what I got. I got two of them.", showing Officer Marshall two revolvers. (Tr. 7-10) Officer Marshall did not actually observe Officer Neer remove any revolvers from the parked vehicle. (Tr. 7-12, 7-19)

Following the testimony of Officer Marshall the Government rested its case. At such time, counsel for Blyther moved for judgment of acquittal as to Blyther in that the Government had failed to prove beyond a reaonsable doubt that there was any possession of a gun by Blyther, and that the

only thing the jury could do is infer that the gun might have belonged to Blyther. (Tr. 7-20) Such motion was taken under consideration. (Tr. 7-24)

Appellant Blyther then took the stand in his own defense and testified that he had known Emanuel Clemmons for about twenty-five years and had met him that evening at about 5:30 or 6:00 p.m. (Tr. 7-42) He further stated that he merely was a rider in the vehicle rented by Emanuel Clemmons (Tr.7-52) and had no knowledge of any objects on the front floor of the vehicle driven by Emanuel Clemmons. (Tr. 7-57)

At the close of Blyther's testimony, counsel for Blyther again moved for judgment of acquittal, which motion was denied. (Tr. 10-267) Subsequently, Emanuel Clemmons elected not to testify and counsel for Emanuel Clemmons rested his case. (Tr. 7-78)

The Government then offered the rebuttal testimony of Officers Neer and Marshall, during which the witnesses reaffirmed their earlier testimony concerning the events testified to on direct. (Tr. 10-271 to 281) At the close of the Government's rebuttal, counsel for Blyther renewed his motion for judgment of acquittal as to Blyther, which motion was denied. (Tr. 10-282)

At the close of the first day of trial, on Thursday, June 7, 1968, the trial court admonished the jury not to

discuss the case with anyone and to keep an open mind. The trial court further stated it was sure there would be nothing about the case in the newspapers or on radio, but if there was, not to pay any attention to it. (Tr. 7-79) At the beginning of the second day of trial, on Friday, June 7, 1968, counsel for Emanuel Clemmons advised the Court that there was prejudicial publicity concerning guns, on local television and in the local newspapers, and that there was a question as to whether or not the jurors exposed to such publicity could dismiss it from their minds. Counsel for both parties then moved the trial court to conduct a voir dire of the jury to ascertain the jury's ability to sit as jurors in the trial, in view of the publicity concerning guns, which motions were denied by the trial court. The trial court further stated it intended to cover such problem with the charge. (Tr. 7-3 to 7-5) At the close of the second day of trial, the trial court advised the jury it was important that the jury not discuss the case with anyone either involved or not involved in the case, and that the jury should wait until counsel had an opportunity to put the case in focus and the jury had the benefit of the court's instructions. The jury further was advised that the trial court was sure that nothing about the case would be in the newspapers, and that the jury should not pay any attention to anything in the newspapers. (Tr. 7-79)

In the charge to the jury, the trial court instructed the jury with respect to the essential elements of the charge of carrying a concealed or dangerous weapon. (Tr. 10-324 to 10-326) As an essential element, the trial court instructed that the jury must find the intent to do the acts which constitute the carrying of a weapon without a license. It then proceeded in interpreting "carrying", to state that a weapon is carried if it is located in such proximity to the person as to be convenient of access and within his reach. The trial court further instructed that in order to find intent to do the acts which constitute the carrying of a weapon without a license, the jury must find the defendant had knowledge that a pistol was being carried, as the Court defined carried. (Tr. 10-325)

The trial court then instructed the jury that the policemen who questioned and searched the men in the car were acting entirely properly within their official duties and that there was no evidence in the case which indicates the policemen were inquiring into matters not their proper concern in the public interest or making any unnecessary or inappropriate use of force. (Tr. 10-326)

Finally, the trial court reminded the jury that it had indicated it would be able to determine the facts in the case solely on the basis of the evidence and law in the case without reference to any other matters including some of the references to guns which had been carried in the newspapers and on

television in recent days. The Court further instructed the jury's determination of the guilt or innocence of a defendant must be reached solely on the basis of the relevant evidence adduced at the trial without any feeling of emotion, bias or prejudice, without any anger on the one hand and without any sympathy on the other. (Tr. 10-326 and 10-327)

After the jury deliberated for approximately two hours the trial court received the following note from the jury foreman:

> "Question: Must a decision be rendered separately for each of the defendants Emanuel Clemmons and Archie Blyther, Jr., or must we decide upon the guilt of Archie Blyther, Jr. only?" (Tr. 10-333)

As a result of such note, the jury was recalled and instructed again that the jury must decide the guilt or innocence of each of the defendants. (Tr. 10-334) The jury deliberated again for approximately thirty-five minutes and upon reconvening the trial, the jury rendered verdicts of guilty for Emanuel Clemmons and appellant Blyther. (Tr. 10-335 and 10-336) Subsequently, the sentence of two to six years was imposed on Blyther.

ARGUMENT

I. The trial court abused its discretion in refusing to continue the trial and conduct a voir dire of the jury to ascertain whether the pervasive prejudicial publicity concerning guns would prevent the jury in rendering a fair and impartial judgment in the case, in violation of the Fifth and Sixth Amendments.

The trial of the present case was conducted in a unique atmosphere. On April 4, 1968, Martin Luther King, a revered civil rights leader, was shot to death by an assassin. At the commencement of this trial, the assassin of Martin Luther King was at large. On the day preceding the commencement of this trial, Robert F. Kennedy, an immensely popular and beloved national leader, was shot in the head by an assassin. That night, former President Johnson addressed the nation on national television during which he commented on the Kennedy assassination, the violence in our nation and the necessity of legislation "to bring the insane traffic of guns to a halt." Other television programs covered the traffic in guns and their ease of acquisition. On the first day of the trial, Robert F. Kennedy died from his gun wounds, and his body was flown to New York City to lie in state. During the second day of trial, the body of Robert F. Kennedy laid in state in St. Patrick's Cathedral as thousands of mourners passed his coffin.

On Saturday morning, June 8, 1968, while this case was recessed, a Requiem mass was held in New York, at which Senator Edward Kennedy delivered an emotional and stirring eulogy to his brother. Following the mass, the body of the late Senator was moved in a special, black draped train to Washington for burial at Arlington National Cemetery, late that evening. On that same day, James Earl Ray, the alleged assassin of Martin Luther King was apprehended in London, England.

The events concerning the Kennedy tragedy, the capture of the alleged assassin of Martin Luther King, the stepped-up campaign for new gun control legislation and the commission of additional crimes of violence involving guns in the District of Columbia received widespread coverage during the time of this trial in the mass media of metropolitan Washington, including The Washington Post, The News and The Evening Star newspapers; WRC/NBC, WTTG, WMAL/ABC and WTOP/CBS television broadcasting stations and practically all radio broadcasting stations.

The Supreme Court most recently considered the question of the effect of prejudicial publicity before and during trial in Rideau v. Louisiana,[1/] Estes v. Texas,[2/] and Sheppard v. Maxwell.[3/] In those cases, the Court held that

1/ 373 U.S. 723, 10 L.ed 2d 663, 83 S.Ct. 1417 (1963)
2/ 381 U.S. 532, 14 L.ed 2d 543, 85 S.Ct. 1628 (1965)
3/ 384 U.S. 333, 16 L.ed 2d 600, 86 S.Ct. 1507 (1966)

prejudicial publicity concerning a defendant and his trial, inherently denies the defendant a fair trial, in violation of the due process clause of the Fourteenth Amendment, even without a showing of prejudice or a demonstration of the nexus between the publicity and the trial. Although the rule established in such cases evolved under circumstances in which the prejudicial publicity concerned a defendant and his trial, the substance of the rationale of the cases supports the proposition that any form of publicity which prejudices or tends to prejudice the right of a defendant to a fair trial, inherently denies such defendant of due process under the Fifth or Fourteenth Amendments and a trial by an impartial jury guaranteed by the Sixth Amendment. This proposition specifically is supported in the Sheppard Case, in which Mr. Justice Clark stated:

> "....Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty in effacing publicity from the minds of jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances....."1/

It is recognized that there always exists a general indignation in our society concerning the commission of a crime, and particularly a crime of violence. Appellant does not contend that a general indignation toward crime generally, or a specific crime, constitutes a sufficiently prejudicial atmosphere to preclude a fair trial. Appellant does contend, however, that contemporaneous and massive publicity concerning the unlawful

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1/ 384 U.S. at 362

and violent use of firearms, has the effect of creating a greatly inflammatory atmosphere, precluding a fair trial of an accused charged with the offense of carrying a dangerous weapon.

It is important to consider that the jury in this case was not sequestered. During the first two days of trial, the jurors were permitted to return to their homes where they were likely to be exposed to the events surrounding the assassination of Senator Kennedy, by television, radio and newspaper. At least one juror was observed in court with a copy of the Washington Post. (Tr. 7-4) On the weekend preceding the final day of trial, the jurors literally became a captive audience to the events involved in the funeral rites. Most commercial establishments were closed and all programs on local television stations were preempted during almost the entire day by special reports of the funeral.

In view of the pervasive prejudicial publicity creating an inflammatory atmosphere during trial, appellant submits that the trial court erred in denying a continuance and/or denying appellant's motion for a vior dire of the jury. While it is true that the trial court admonished the jury in general terms regarding the events which were occurring (Tr. 6-64, 7-79), and reminded the jury of its obligation to consider only the facts in the case at the close of the trial, (Tr. 10-326, 10-327) such instructions cannot be construed to be curative. Once the jury has been exposed to improper influence, its ability to act fairly and impartially is suspect. In Bruton v. United States,[1/]

1/ --U.S.--, 20 L.ed 2d 476, 88 S.Ct. (1968)

the Supreme Court commented on the effectiveness of a trial judge's instructions to a jury, wherein Mr. Justice Brennan stated:

> "It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless, as recognized in Jackson v. Denno,[1] supra, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." [2]

Appellant submits that the pervasive prejudicial publicity in the present case, and the probability that the jury did not or could not follow the trial judge's instructions to disregard such publicity, denied Blyther the protection of the Fifth and Sixth Amendments.

II. The joinder of defendants was initially improper and prejudicial to appellant Blyther.

Rule 8(b)[3] provides that two or more defendants may be charged in the same indictment if they are alleged to have participated in the same act or transaction constituting an offense. Rule 14[4] provides that if it appears a defendant is prejudiced by a joinder of defendants for trial, a court may grant a severance of defendants or provide whatever other relief justice requires. Appellant contends his joinder with

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1/ 378 U.S. 368, 12 L.ed 2d 908, 84 S.Ct. 1774 (1964)
2/ 20 L.ed 2d at 485
3/ Fed. Rule Crim. Proc. 8(b), 18 U.S.C.A.
4/ Red. Rule Crim. Proc. 14, 18 U.S.C.A.

Emanuel Clemmons for trial was improper ab initio and prejudicial in view of the trial proceedings.

Appellant Blyther and Emanuel Clemmons each were charged with the offense of carrying a dangerous weapon without a license.[1] The alleged offenses of the two defendants may be construed as contemporaneous similar acts but not the "same act or transaction" within the meaning of Rule 8(b). Under the circumstances of this case the alleged offense of carrying a dangerous weapon without a license cannot be construed as an act capable of being performed by more than a single individual, or a transaction capable of involving more than one individual.

In District of Columbia v. Hunt,[2] this Court, confronted with the question of the propriety in the consolidation of three defendants for trial, each charged with the offense of vagrancy, recognized that "joinder is permitted only if the defendants are alleged to have participated in the same act or transaction . . . . constituting an offense . . . ."[3] There, this Court found that the similar acts of vagrancy of the defendants were not subject to joinder.[4] The offense of carrying a dangerous weapon without a license is similar to the offense of vagrancy in the sense that both offenses are personal in nature. It thus is submitted that the joinder in this action was improper ab initio as it was in the Hunt case.

1/ 22 D.C. Code 3204
2/ 47 A.2d 783, 163 F.2d 833 (1947)
3/ 163 F.2d at 835
4/ Id.

The necessity of severance of defendants under Rule 14 is equally obvious from the prejudice to the rights of Blyther which developed in the course of the joint trial. That Blyther was prejudiced in being tried jointly with Emanuel Clemmons is apparent, in that 1) Blyther may have subpoenaed Emanuel Clemmons as a witness in his defense had separate trials been conducted and Clemmons was tried first, 2) the overwhelming evidence against Emanuel Clemmons was siphoned off and imposed on Blyther, 3) Blyther was tainted with effect of Clemmons electing not to testify (Tr. 7-74 to 7-78) conduct looked upon with disfavor by juries, 4) the jury was clearly confused as evidenced by the jury's note to the trial court, (Tr. 10-333) and 5) the trial judge's ruling on Blyther's motion for judgment of acquittal was influenced by his apparent and erroneous (Tr. 10-337) belief that Blyther was implicated in an armed robbery with Emanuel Clemmons. (Tr. 7-23).

Traditionally, the courts have regarded the court's instructions to the jury, the selectivity in a jury's verdict, the presence of overwhelming evidence of guilt on the record, or the imposition of concurrent sentences as a cure for prejudicial joinder.[1/] It is submitted, however, that none of such doctrines are appropriate or applicable here. Cure by instructions to the jury is deemed insufficient in view of Bruton v. United States.[2/] Cure by a showing of selectivity in the jury's verdict has been rejected by this Court.[3/] The

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1/ 74 Yale Law Journal 953
2/ --U.S.--, 20 L.ed 476, 88 S.Ct. - (1968)
3/ Cross v. United States, 118 U.S.App.D.C.324, 335 F. 2d 987 (1964)

presence of overwhelming guilt and the imposition of concurrent sentences obviously are not applicable in this case. Appellant thus contends that the joinder of defendants in this action prejudiced substantial rights [1] of Blyther, and that such prejudice was not effectively cured.

III. The arrest of Blyther and Emanuel Clemmons and the search and seizure following the arrest were unlawful.

The record shows clearly that when Officer Neer first observed Blyther and Emanuel Clemmons, they were sitting in a parked vehicle in an alley. (Tr. 6-25) Within thirty to sixty seconds of the time he arrived on the scene (Tr. 6-39) he approached the driver's side of the vehicle. (Tr.6-26) When he arrived on the driver's side of the parked vehicle, he observed the door beginning to open, (Tr. 6-26) although no portion of the body of the occupant of the driver's seat was out of the vehicle. (Tr. 6-47) At this point Officer Neer grabbed the door on the driver's side of the vehicle (Tr. 6-27) to prevent the occupant from leaving. (Tr. 6-27, 6-60)

Officer Neer further testified that after he grabbed the left door of the parked vehicle, he opened the door, exposing a revolver at the feet of Emanuel Clemmons. ,(Tr.6-27, 6-48, 6-51) He then drew his service revolver and ordered appellant Blyther and Emanuel Clemmons out of the vehicle. (Tr. 6-46, 6-49)

1/ Kotteakos v. United States, 328 U.S. 750, 90 L.ed 1557, 66 S.Ct.1239 (1946); Schaffer v. United States, 362 U.S. 511, 4 L.ed 2d 921, 80 S.Ct.945 (1960).

In Henry v. United States, [1] FBI agents investigating a theft of whiskey, had information concerning defendant's implication in certain shipments. They observed the defendant drive his car into an alley and stop, load some cartons in his car and then drive off. The agents were unable to follow the defendant's car but later found it parked. They then observed the defendant get into the car, drive to the same alley, load some more cartons into the car and then drive away. At that point, the agents followed and stopped the defendant's car. A search of the defendant's car revealed that the cartons being transported contained stolen radios.

The Supreme Court in Henry held that the arrest of the defendant was complete at the time the FBI agents interrupted the defendant and his companion and restricted their liberty of movement. [2] With the point of arrest thus established, the Court proceeded to state it was then necessary to determine whether at or before the time of the arrest, the agents had reasonable cause to believe that a crime had been committed. [3] It further was stated by the Court that an arrest is not justified by what a subsequent search discloses, citing Johnson v. United States. [5] In determining

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1/ 361 U.S. 98, 4 L.ed 2d 134, 80 S.Ct. 168 (1959)
2/ 361 U.S. at 139
3/ Id.
4/ Id.
5/ 333 U.S. 10, 92 L.ed 436, 68 S.Ct. 367 (1948)

whether there was reasonable cause for an arrest, the Court considered the agents' information concerning the defendant's implication in certain shipments, and their observance of the conduct of the defendant for a considerable period of time preceding the arrest. It found, however, that there was no reasonable or probable cause and that the arrest was unlawful.[1/]

Appellant contends that the arrest of Blyther and Emanuel Clemmons occurred at the time Officer Neer grabbed the door handle on the left side of the parked vehicle in which both were sitting, and restricted the liberty of movement of Emanuel Clemmons. It further is submitted that since the arrest cannot be justified by the weapons and ammunition found during the search following the arrest, it was necessary for Officer Neer to have reasonable or probable cause to make the arrest. In this respect, there is no evidence in the record to support reasonable or probable cause for the arrest.

Appellant thus contends that the arrest of appellant and Emanuel Clemmons and the search following such arrest were unlawful, in violation of the Fourth and Fifth Amendments.

1/ 361 U.S. at 139

IV. The trial court erred in instructing the jury that the officer involved in the arrest of appellant Blyther and Emanuel Clemmons acted entirely properly and that there was no evidence of improper inquiry or unnecessary force.

In Querica v. United States[1] the trial judge informed the jury that the defendant's testimony was a lie except when it agreed with the Government's testimony because the defendant wiped his hands during his testimony. Subsequently, the jury returned a verdict of guilty. In reversing, the Supreme Court held that a trial judge may analyze and dissect the evidence, but he may not distort it or add to it.[2] The Court further held that since the influence of the trial judge on the jury is necessarily and properly of great weight, and the trial judge's lightest word or intimation is received with deference, and may prove controlling, the trial judge has a duty to use great care that an expression of opinion upon the evidence should be so given as not to mislead, and especially that it should not be one-sided.[3]

In the present case there is conflicting testimony in the record concerning appellant Blyther's location in the parked vehicle when Officer Neer arrived in the alley in which the vehicle was located. Officer Neer testified that when he first observed Blyther, he was sitting in the middle of the front seat of the vehicle, (Tr. 6-38) and that when he

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1/ 289 U.S. 466, 77 L.ed 1321, 53 S.Ct. 698 (1933)
2/ 289 U.S. at 470
3/ Id.

subsequently searched the vehicle he found a revolver at the feet of Blyther. (Tr. 6-40) Blyther testified that when Officer Neer arrived on the scene, he was sitting on the rear seat of the vehicle. (Tr. 7-54)

The trial judge instructed the jury in this case that the police officers including Officer Neer, were acting entirely properly within their official duties, and there was no evidence in this case which indicated the police were inquiring into matters not their proper concern in the public interest or making any unnecessary or inappropriate use of force. (Tr. 10-329) In view of the patently unlawful arrest and search by Officer Neer[1] and the conflict in the testimony of Officer Neer and appellant Blyther on a vital point, it is submitted that the trial judge in his charge to the jury, breeched the duty imposed upon him by Querica.[2] The import of the charge obviously is to enhance the creditability of Officer Neer.

The circumstances of the present case, in this respect, are similar to the circumstances in Harding v. United States.[3] There, a conflict in testimony arose between the defendant and a secret service agent testifying for the Government. In his charge to the jury, the trial judge stated that the testimony of the secret service agent had not been impeached and that the jury could rely upon his testimony entirely.[4] In reversing, the

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1/ Supra, Pg. 21
2/ 289 U.S. 466
3/ 335 F.2d 515 (9 Cir., 1964)
4/ 335 F.2d at 516

Ninth Circuit held that the comments of the District Court constituted plain error and precluded a fair and dispassionate consideration of the evidence by the Jury. 1/

Similarly, the comments of the trial court in this case constituted plain error, precluding a fair consideration of the evidence by the jury.

V. The trial court erred in not clearly instructing the jury of the requirement of intent to carry, as an element of the offense charged.

During trial, the question arose as to whether the passengers of a Capitol Transit bus could be indicted under 22 D.C. Code 3204 in circumstances where a gun was found on the floor of the bus. (Tr. 7-22) With respect to such question, the Government took the position that there would not be a violation of the statute because the gun would not be convenient to access of all passengers and would not be in the exclusive possession of the passengers. (Tr. 7-22) The Government thus infers and appellant Blyther strongly urges that an essential element of the offense of carrying a dangerous weapon under the statute is the intent to exercise control over the weapon.

If the statute 2/ is considered applicable under circumstances where a person had knowledge of and convenient access to a gun but had no intent to exercise control over the

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1/ 335 F.2d at 518
2/ 22 D.C. Code 3204

gun, such as in circumstances where a passenger boards a Capitol Transit bus and sits near a gun on the floor, which is seen and within easy access, the statute would lack a reasonable nexus between its purpose, i.e., the control of carrying firearms,[1] and its effects. The lack of a reasonable nexus between a statute and its effects renders a statute unreasonable, and the application of an unreasonable statute constitutes a denial of substantive due process.

This Court has held that a defendant's right to have the jury pass on each element of the offense imposes a duty on the trial judge to give proper instructions on each element of the offense charged, even though no request is made by defense counsel for such instructions.[2] In the present case, although the trial judge sought to interpret the meaning of "carrying" under the statute (Tr. 10-325), he omitted instructing the jury that it must find that appellant Blyther must have had the intent to exercise control over at least one of the weapons found in the vehicle.

If intent to exercise control over a weapon is an essential element of the offense of carrying a deadly weapon, then the trial court erred in not so charging the jury. On the other hand, if such intent is not deemed an essential element of the offense charged, the statute is unreasonable and its application in these circumstances constitutes a denial of substantive due process.

1/ Cook v. United States, 107 U.S. App. D.C. 233, 275 F.2d 887 (1960)
2/ Byrd v. United States, 119 U.S. App. D.C. 360, 342 F.2d 939 (1965)

VI. The trial court erred in refusing to grant appellant Blyther's motion for judgment of acquittal.

In Curley v. United States, [1] this Court stated the rule that if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, a motion for a directed verdict of acquittal must be granted. [2] Appellant contends that considering the Government's case here in a light most favorable to the Government, there was no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt.

At the close of the Government's case, the evidence showed that when Officer Neer first observed Emanuel Clemmons, Blyther and Rudolph Clemmons, Emanuel Clemmons was sitting in the driver's seat of the vehicle, (Tr. 6-25) Blyther was sitting in the middle of the front seat (Tr. 6-38) and Rudolph Clemmons was standing outside the vehicle by the right door which was open. (Tr. 6-38) The evidence further showed that a revolver was found at the feet of Emanuel Clemmons and another revolver was found on the front floor, five inches from the right door. (Tr. 6-29) The Government's case further established that no weapons or ammunition were found on the persons of Blyther and Rudolph Clemmons. (Tr. 7-8) Furthermore, there is no evidence in the record that the vehicle in which the defendants were

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1/ 81 U.S. App. D.C. 389, 160 F.2d 229, (1947)
2/ 160 F.2d at 232

found either was owned or under the control of Blyther, or that Blyther's fingerprints were found on either of the weapons or the ammunition.

Under such circumstances, it would appear that a reasonable mind might fairly conclude that since Blyther was sitting in the middle of the front seat of the vehicle and Rudolph Clemmons was standing near the right door that was open, Rudolph Clemmons may have been sitting in the car also. What other probable reason can there be for appellant Blyther sitting in the middle of the front seat?

In view of the fact that one weapon was positioned at the feet of Emanuel Clemmons and the other weapon was positioned within easy access to Rudolph Clemmons (whether in or out of the vehicle), and the fact that there is no evidence of Blyther's fingerprints on either of the weapons, it would be reasonable to conclude that Emanuel Clemmons and Rudolph Clemmons had exclusive possession and control over the two weapons. Under such circumstances, there was no evidence at the close of the Government's case upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, and accordingly the trial court erred in refusing to grant Blyther's motion for judgment of acquittal.

CONCLUSION

For the foregoing reasons, appellant Blyther respectfully requests that this Court reverse the judgment of the District Court in this case, and that his sentence be vacated.

Respectfully submitted,

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Attorney for Appellant
(Appointed by This Court)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief have been served personally at the office of the United States Attorney, United States District Courthouse, Washington, D.C., this 14th day of March, 1969.

Peter N. Lalos

ADDENDUM

Constitutional Provisions, Statutes and Rules Involved

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 22 of the District of Columbia Code, section 3204, provides:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

Rule 8(b) of the Federal Rules of Criminal Procedure provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 of the Federal Rules of Criminal Procedure provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

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vs.

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Appellant.

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ARGUMENT

I. An appellate court may notice plain errors or defects affecting substantial rights although such errors or defects were not brought to the attention of the trial court.

Rule 52(b)[1] is explicit in providing that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court. Even prior to the adoption of the Federal Rules of Criminal Procedure, the Supreme Court held that in criminal cases, appellate courts may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.[2] In keeping with the obvious intent of the Rule and the holding of the Supreme Court in Atkinson[3], the Court of Appeals for the District of Columbia has readily noticed plain errors or defects of substantial rights although such errors or defects were not brought to the attention of the trial court.[4] Furthermore, appellate courts have readily noticed errors not brought to the attention of the trial court where such errors involved the

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1/ Fed. Rule Crim. Proc. 52, 18 U.S.C.
2/ U.S. v. Atkinson, 297 U.S. 157, 80 L.ed. 555, 56 S.Ct. 391
3/ Id.
4/ Bradley v. U.S., 102 U.S. App. D.C. 17, 244 F.2d 922 (1957); Durham v. U.S., 99 U.S. App. D.C. 132, 237 F.2d 760 (1956); Simmons v. U.S., 92 U.S. App. D.C. 122, 206 F.2d 427 (1953); Tatum v. U.S., 88 U.S. App. D.C. 396, 190 F.2d 612 (1951); Robertson v. U.S., 84 U.S. App. D.C. 7, 171 F.2d 345 (1948).

admission of inadmissible evidence[1] and improper instructions to a jury.[2]

The Government in its brief stated that Schmerber v. California[3] followed the rationale of Rule 41(e)[4] in holding that objections to the receipt of evidence must be made at the time the evidence is offered. However, this is misleading. The Schmerber[5] case merely holds that an error on the trial court level involving a violation of a defendant's Fifth Amendment privilege against self-incrimination cannot be cited for the first time on the Supreme Court level. The decision in no manner restricts the ability of a Court of Appeals to notice plain errors or defects under Rule 52(b). The Government further has argued that Rule 41(e) is a wise one, for otherwise the Government is deprived the opportunity of supporting the reasonableness of an arrest with an appropriate record. The Third Circuit, however, in United States v. Lawson[6] responded to such an argument stating that considerations of assuring the accused a fair trial will prevail over the important policy of having counsel point out errors immediately so that correction can occur then and there.[7]

1/ Alexander v. U.S., 390 F.2d 101 (5 Cir., 1968); U.S. v. Asendio, 171 F.2d 122 (3 Cir., 1948)

2/ Sherwin v. U.S., 320 F.2d 137 (9 Cir., 1963), certiorari denied 375 U.S. 964, 11 L.ed 2d 420, 84 S.Ct. 481 ; Smith v. U.S., 257 F.2d 133 (10 Cir., 1958); U.S. v. Perplies, 165 F.2d 874 (7 Cir., 1948)

3/ 384 U.S. 775, 765-6, n.9 (1966)

4/ Fed. Rule Crim. Proc. 41(e)

5/ Id.

6/ U.S. v. Lawson, 337 F.2d 800 (1964), certiorari denied 380 U.S. 919, 13 L.ed 2d 804, 85 S.Ct. 913.

7/ Id. at page 811

It is apparent from the record that there were plain errors in appellant's trial here, and that such errors affected appellant's substantial rights under the Fourth, Fifth and Sixth Amendments. In view of this, the Court should notice such errors and consider them on the merits.

II. Failure to object to prejudicial joinder, before trial, does not constitute waiver.

The prejudicial nature of the joinder of appellant Blyther with Emanuel Clemons became apparent during the course of the trial proceedings, and particularly during the presentation of the Government's case and the subsequent inquiry made by the jury regarding Blyther. (Tr. 10-333) In view of this, Rule 12[1/] is not applicable since it relates exclusively to defenses or objections prior to trial.

Rule 14[2/] permits severance regardless of the propriety of original joinder if required to avoid prejudice.[3/] To apply Rule 12(b) (2)[4/] to bar relief from prejudicial joinder which becomes manifest during trial, effectively would vitiate Rule 14. Accordingly, the Court should consider appellant's argument citing prejudicial joinder on its merits.

1/ Fed. Rule Crim. Proc. 12, 18 U.S.C.
2/ Fed. Rule Crim. Proc. 14, 18 U.S.C.
3/ Peckman v. U.S., 93 U.S. App.D.C.136, 210 F.2d 693 (1953)
4/ Fed. Rule Crim. Proc. 12(b) (2), 18 U.S.C.

III. Terry v. Ohio[1] does not overrule Henry V. United States.[2]

Although the Government in Henry v. United States may have conceded that arrest of the defendants occurred when the federal agents stopped their automobile, as stated in the Government's brief here, such concession was incidental and of no moment in that the Court there, sua sponte, made such a determination as a matter of law. That Henry v. United States is authority for the proposition of law that an arrest takes place at the moment an individual's freedom of movement is restricted, is manifest in the great number of cases which have relied upon Henry v. United States as an authority for such proposition.

The Government argues that Henry v. United States must be seen as "largely" overruled by Terry v. Ohio. This contention is not supported upon a close examination of Terry. In the majority opinion of the Court, Chief Justice Warren did not make any reference to Henry which reasonably could be construed as overruling Henry and, furthermore, carefully defined the restricted scope of Terry in stating:

1/ 392 U.S.1, 20 L.ed 2d 889, 88 S.Ct. - (1968).
2/ 361 U.S. 98, 4 L.ed 2d 134, 80 S.Ct. 168 (1959).

".....We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous; where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries; and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or other's safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken."1/

IV. Terry v. Ohio2/ does not control the disposition of this case.

The record of the present case reveals that when Officer Neer entered the alley in which the vehicle occupied by appellant Blyther and Emanuel Clemons was parked, he observed Emanuel Clemons seated in the driver's seat of the vehicle, appellant Blyther seated in the middle of the front seat of the vehicle, and Rudolph Clemons standing adjacent the right front door, which was open. The fact that the right front door of the vehicle was open indicates that the interior light of the vehicle was on. The testimony of Officer Neer further

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1/ 392 U.S. 30, 31
2/ 392 U.S. 1, 20 L.ed 2d 889, 88 S.Ct.

establishes that he parked his vehicle directly in front of the Clemons' vehicle, with his headlights on and his spotlight directed to the interior of the vehicle. Officer Neer further testified that less than a minute elapsed from the time he entered the alley, observed the parked vehicle, positioned his vehicle in front of the parked vehicle, got out of his vehicle, crossed in front of both of the vehicles, and arrived at the driver's side of the parked vehicle. In the course of the entire testimony of Officer Neer it was never revealed that he observed any suspicious activity of appellant Blyther, Emanuel Clemons or Rudolph Clemons, or was apprehensive with respect to his own safety. Furthermore, there is no evidence of record that Officer Neer believed that Emanuel Clemons was attempting to flee when he grabbed the handle of the door on the driver's side of the vehicle which Emanuel Clemons began to open as Officer Neer approached the vehicle.

Terry v. Ohio authorizes a carefully limited search of the outer clothing of a person in an attempt to discover weapons which might be used to assault an officer, only under circumstances where an officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and the persons with whom he is dealing may be armed and presently dangerous. From the evidence in the present case, almost exclusively developed through the

testimony of Officer Neer, it hardly is conceivable that Officer Neer reasonably could be construed to have thought that criminal activity was afoot and that appellant Blyther, Emanuel Clemons and Rudolph Clemons were armed and dangerous at the time he approached the parked vehicle. Moreover, it hardly is conceivable that if Officer Neer was apprehensive for his own safety, he would have approached the parked vehicle in the open and direct manner which he did. The record shows that Officer Neer became apprehensive of the occupants of the vehicle only after he discovered a weapon in the vehicle as a result of a search which was unlawful.

It thus is clear that in the absence of any evidence of suspicion of criminal activity afoot and apprehension on the part of Officer Neer, Terry v. Ohio does not control the disposition of this case.

IV. Assuming Emanuel Clemons was arrested for illegal parking, the search following such arrest was unreasonable in view of the nature of the offense prompting the arrest.

The record vaguely establishes and the Government fleetingly alludes to the fact that the vehicle of Emanuel Clemons was illegally parked at the time it was first encountered by Officer Neer. Although the Government appears to be proceeding solely on the theory that the search of Emanuel Clemon's vehicle was lawful under Terry v. Ohio [1], in the event the Government

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1/ 392 U.S. 1, 20 L. ed 2d 889, 88 S.Ct. -

may urge that the search was lawful as incidental to a lawful arrest for illegal parking, then, it is submitted that Amador-Gonzalez v. United States[1] should control the disposition of this case. There, the Fifth Circuit held that a lawful arrest of an automobile driver for a traffic offense provides no lawful predicate for the search of the driver or his car - absent special circumstances.[2] It is submitted there are no such special circumstances in the present case.

V. The Government's application of Rideau, Estes and Sheppard[3] is unduly restrictive.

In construing Rideau, Estes and Sheppard, the Government would require, in the trial of an accused involving alleged prejudicial publicity, only that there be no press coverage disruptive of the proceedings of the courtroom, that the issues to be tried in the courtroom not be tried elsewhere, and that the trial be conducted in "judicial calm and serenity", in order to assure a fair trial under the Fifth and Sixth Amendments. In essence, the Government takes the position that unless the circumstances of certain trial proceedings involving

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1/ 391 F.2d 308 (5 Cir., 1968)
2/ Id. at page 315
3/ Rideau v. Louisiana, 373 U.S. 723, 10 L.ed 2d 663, 83 S.Ct. 1417 (1963); Estes v. Texas, 381 U.S. 532, 14 L.ed 2d, 85 S.Ct. 1628 (1965); Sheppard v.Maxwell, 384 U.S. 333; 16 L.ed 2d 600, 86 S.Ct. 1507 (1966)

publicity, fall precisely within the factual framework of Rideau, Estes or Sheppard, there is no denial of a fair trial. This, however, totally fails to take notice of the real essence of the Supreme Court's clear mandate.

The facts of Rideau, Estes and Sheppard are significant only in that they are the manifestations of a denial of a fair trial due to prejudicial publicity. They do not establish a standard or a test to be applied in determining whether a fair trial has been denied in circumstances of alleged prejudicial publicity.

Under the rationale of Rideau, Estes and Sheppard, this Court is not restricted to a finding of circumstances identical to the precise circumstances of Rideau, Estes or Sheppard in order to find a denial of a fair trial due to prejudicial publicity, but need only make an independent evaluation of the proceedings and atmosphere surrounding the trial of an accused to determine whether the accused received a trial by an impartial jury free from outside influences.

CONCLUSION

For the additional foregoing reasons, appellant Blyther respectfully requests that this Court reverse the judgment of the District Court in this case, and that his sentence be vacated.

Respectfully submitted,

Peter N. Lalos
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Attorney for Appellant
(Appointed by This Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief was served personally at the office of the United States Attorney, United States District Courthouse, Washington, D.C., this 9th day of June, 1969.

Peter N. Lalos

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the trial court abused its discretion in refusing to continue and conduct a voir dire of the jury to ascertain whether the pervasive prejudicial publicity concerning guns would prevent the jury in rendering a fair and impartial judgment in the case, in violation of the Fifth And Sixth Amendments.

II. Whether the joinder of defendants was improper and prejudicial to appellant Blyther.

III. Whether the arrest of appellant Blyther and Emanuel Clemmons and the search and seizure following the arrest were unlawful, in violation of the Fourth and Fifth Amendments.

IV. Whether the trial court erred in instructing the jury that the officer involved in the arrest acted entirely proper, and that there was no evidence in the case of improper inquiry or unnecessary or inappropriate use of force.

V. Whether the trial court erred in not clearly instructing the jury of the requirement of intent to carry, as an element of the offense charged.

VI. Whether the trial court erred in refusing to grant appellant Blyther's motion for judgment of acquittal.

The pending case has not been previously before this Court under the same or similar title.

STATEMENT OF THE CASE

Appellant Archie Blyther, Jr. and Emanuel Clemmons were indicted on separate counts for carrying a dangerous weapon in violation of Title 22, District of Columbia Code, Section 3204. Both defendants were tried together in Criminal Action No. 1550-67 and both were found guilty. On the grounds of a prior conviction for a felony, a sentence of 2-6 years was imposed on appellant Blyther, who has been committed and is now serving sentence. In view of the fact that this appeal and appeal No. 22,344 involving Emanuel Clemmons arose from the same indictment and trial in the District Court, this Court ordered the consolidation of the appeals of the two parties.

The trial of Criminal Action No. 1550-67 was conducted on Thursday, June 6, 1968, Friday, June 7, 1968 and the following Monday, June 10, 1968. The Government's case consisted of the testimony of Officer Robert E. Neer and Officer Kenneth Marshall, the arresting officers, and certain weapons and ammunition seized during the arrest of the defendant. Appellant Blyther elected to take the stand and testify while Emanuel Clemmons elected to stand mute. Neither of the defendants presented any other witnesses.

Officer Neer testified that on September 29, 1967 at about 8:30 p.m. he had occasion to be in the vicinity of an alley in the rear of 312 Twelfth Street, S.E., in the City of Washington, where he observed a parked vehicle. He entered the alley in which the vehicle was parked and positioned his vehicle directly in front of the parked vehicle with his headlights on. He also directed the spotlight of his vehicle into the middle of the windshield of the parked vehicle. (Tr. 6-24)[1/] At the time, he observed Emanuel Clemmons sitting behind the steering wheel of the parked vehicle, (Tr. 6-25) appellant Blyther sitting in the middle of the front seat of the parked vehicle and a third person outside of the right side of the parked vehicle where the door was open. (Tr.6-26) Officer Neer stated that he got out of his vehicle, walked across the front of the two vehicles and approached the lefthand side or driver's side of the parked vehicle. (Tr. 6-26, 6-45) As he approached the left side of the parked vehicle the left door started to open, at which time Officer Neer grabbed the door handle maintaining control of the door and opened the door. (Tr. 6-26, 6-27, 6-48) Upon opening the door, Officer Neer observed a revolver lying on the floor immediately at the feet of Emanuel Clemmons. He

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1/ Throughout this brief, prefixes 6, 7 and 10 denote the separate transcripts of the trial proceedings for June 6, 7 and 10, respectively.

then ordered Emanuel Clemmons and appellant Blyther out of the parked vehicle and commenced searching Emanuel Clemmons. (Tr. 6-27, 6-48) In patting down Emanuel Clemmons, Officer Neer found on his person a 32-20 caliber Winchester ammunition box, twenty-four 32-20 caliber brass shells in his jacket and nine extra rounds of 32-20 caliber brass ammunition which were retrieved from his pants pocket. (Tr. 6-28)

When Officer Neer first entered the alley and observed the parked vehicle, he radioed for assistance. (Tr. 6-49) The assistance arrived as he was patting down Emanuel Clemmons. The first officer to arrive on the scene after Officer Neer was Officer Kenneth Marshall. (Tr. 6-42) Subsequently, additional assistance arrived on the scene, including a patrol wagon. Emanuel Clemmons, appellant Blyther, and the third person found standing near the parked vehicle, identified as Rudolph Clemmons, were placed in the patrol wagon. (Tr. 7-8) After appellant Blyther and the others were placed in the patrol wagon, Officer Neer conducted a further investigation of the parked vehicle and found a fully loaded 32-20 caliber pistol on the floor of the driver's side of the vehicle (Tr. 6-29) and a fully loaded 32-20 caliber pistol on the floor on the right side of the parked vehicle. (Tr. 6-29)

The Government's Exhibit 1-A was identified by Officer Neer as the revolver which he removed from the left side of the parked vehicle. (Tr.6-31) Government's Exhibit 1-B was identified by Officer Neer as the box containing the ammunition which was removed from the right jacket pocket of Emanuel Clemmons. (Tr. 6-31) Government's Exhibit 2-A was identified by Officer Neer as the revolver removed from the right side of the parked vehicle and Government's Exhibit 2-B was identified by Officer Neer as a box containing the six shells removed from one of the revolvers. (Tr. 6-32) The Government's Exhibits 1-A, 1-B, 2-A and 2-B were offered and received in evidence. (Tr. 7-20)

Officer Neer further stated that he observed Emanuel Clemmons and appellant Blyther approximately thirty to sixty seconds before ordering them to get out of the parked vehicle. (Tr. 6-39) He further testified that when he first approached the driver's side of the parked vehicle, the lefthand door was partially open and at that point he grabbed the door handle and opened the door, exposing the weapon which was lying at the feet of Emanuel Clemmons. (Tr. 6-47, 6-48) Upon observing the revolver lying at the feet of Emanuel Clemmons, Officer Neer drew his service revolver and ordered Emanuel Clemmons and appellant Blyther out of the parked vehicle. (Tr.6-48) It also was stated by Officer Neer that when he

arrived on the left side of the parked vehicle and the door on the lefthand side of the parked vehicle began opening, he grabbed the door to prevent Emanuel Clemmons from leaving the car. (Tr. 6-60)

Officer Marshall testified that he received a radio call at approximately 8:30 to 8:31 p.m. to proceed to the scene of the parked vehicle and arrived on the scene approximately a minute later. (Tr. 7-13) When he arrived at the location of the parked vehicle he noticed Officer Neer patting down Emanuel Clemmons. He then proceeded to pat down appellant Blyther and Rudolph Clemmons, but found no weapons on them. (Tr. 7-8) After patting Blyther and Clemmons down, the patrol wagon arrived and Officer Marshall assisted by other policemen placed appellant Blyther and the others in the patrol wagon. (Tr. 7-8) He then returned to the parked vehicle, whereupon, Officer Neer stated to him "Look what I got. I got two of them.", showing Officer Marshall two revolvers. (Tr. 7-10) Officer Marshall did not actually observe Officer Neer remove any revolvers from the parked vehicle. (Tr. 7-12, 7-19)

Following the testimony of Officer Marshall the Government rested its case. At such time, counsel for Blyther moved for judgment of acquittal as to Blyther in that the Government had failed to prove beyond a reaonsable doubt that there was any possession of a gun by Blyther, and that the

only thing the jury could do is infer that the gun might have belonged to Blyther. (Tr. 7-20) Such motion was taken under consideration. (Tr. 7-24)

Appellant Blyther then took the stand in his own defense and testified that he had known Emanuel Clemmons for about twenty-five years and had met him that evening at about 5:30 or 6:00 p.m. (Tr. 7-42) He further stated that he merely was a rider in the vehicle rented by Emanuel Clemmons (Tr.7-52) and had no knowledge of any objects on the front floor of the vehicle driven by Emanuel Clemmons. (Tr. 7-57)

At the close of Blyther's testimony, counsel for Blyther again moved for judgment of acquittal, which motion was denied. (Tr. 10-267) Subsequently, Emanuel Clemmons elected not to testify and counsel for Emanuel Clemmons rested his case. (Tr. 7-78)

The Government then offered the rebuttal testimony of Officers Neer and Marshall, during which the witnesses reaffirmed their earlier testimony concerning the events testified to on direct. (Tr. 10-271 to 281) At the close of the Government's rebuttal, counsel for Blyther renewed his motion for judgment of acquittal as to Blyther, which motion was denied. (Tr. 10-282)

At the close of the first day of trial, on Thursday, June 7, 1968, the trial court admonished the jury not to

discuss the case with anyone and to keep an open mind. The trial court further stated it was sure there would be nothing about the case in the newspapers or on radio, but if there was, not to pay any attention to it. (Tr. 7-79) At the beginning of the second day of trial, on Friday, June 7, 1968, counsel for Emanuel Clemmons advised the Court that there was prejudicial publicity concerning guns, on local television and in the local newspapers, and that there was a question as to whether or not the jurors exposed to such publicity could dismiss it from their minds. Counsel for both parties then moved the trial court to conduct a voir dire of the jury to ascertain the jury's ability to sit as jurors in the trial, in view of the publicity concerning guns, which motions were denied by the trial court. The trial court further stated it intended to cover such problem with the charge. (Tr. 7-3 to 7-5) At the close of the second day of trial, the trial court advised the jury it was important that the jury not discuss the case with anyone either involved or not involved in the case, and that the jury should wait until counsel had an opportunity to put the case in focus and the jury had the benefit of the court's instructions. The jury further was advised that the trial court was sure that nothing about the case would be in the newspapers, and that the jury should not pay any attention to anything in the newspapers. (Tr. 7-79)

In the charge to the jury, the trial court instructed the jury with respect to the essential elements of the charge of carrying a concealed or dangerous weapon. (Tr. 10-324 to 10-326) As an essential element, the trial court instructed that the jury must find the intent to do the acts which constitute the carrying of a weapon without a license. It then proceeded in interpreting "carrying", to state that a weapon is carried if it is located in such proximity to the person as to be convenient of access and within his reach. The trial court further instructed that in order to find intent to do the acts which constitute the carrying of a weapon without a license, the jury must find the defendant had knowledge that a pistol was being carried, as the Court defined carried. (Tr. 10-325)

The trial court then instructed the jury that the policemen who questioned and searched the men in the car were acting entirely properly within their official duties and that there was no evidence in the case which indicates the policemen were inquiring into matters not their proper concern in the public interest or making any unnecessary or inappropriate use of force. (Tr. 10-326)

Finally, the trial court reminded the jury that it had indicated it would be able to determine the facts in the case solely on the basis of the evidence and law in the case without reference to any other matters including some of the references to guns which had been carried in the newspapers and on

television in recent days. The Court further instructed the jury's determination of the guilt or innocence of a defendant must be reached solely on the basis of the relevant evidence adduced at the trial without any feeling of emotion, bias or prejudice, without any anger on the one hand and without any sympathy on the other. (Tr. 10-326 and 10-327)

After the jury deliberated for approximately two hours the trial court received the following note from the jury foreman:

> "Question: Must a decision be rendered separately for each of the defendants Emanuel Clemmons and Archie Blyther, Jr., or must we decide upon the guilt of Archie Blyther, Jr. only?" (Tr. 10-333)

As a result of such note, the jury was recalled and instructed again that the jury must decide the guilt or innocence of each of the defendants. (Tr. 10-334) The jury deliberated again for approximately thirty-five minutes and upon reconvening the trial, the jury rendered verdicts of guilty for Emanuel Clemmons and appellant Blyther. (Tr. 10-335 and 10-336) Subsequently, the sentence of two to six years was imposed on Blyther.

ARGU ENT

I. The trial court abused its discretion in refusing to continue the trial and conduct a voir dire of the jury to ascertain whether the pervasive prejudicial publicity concerning guns would prevent the jury in rendering a fair and impartial judgment in the case, in violation of the Fifth and Sixth Amendments.

The trial of the present case was conducted in a unique atmosphere. On April 4, 1968, Martin Luther King, a revered civil rights leader, was shot to death by an assassin. At the commencement of this trial, the assassin of Martin Luther King was at large. On the day preceding the commencement of this trial, Robert F. Kennedy, an immensely popular and beloved national leader, was shot in the head by an assassin. That night, former President Johnson addressed the nation on national television during which he commented on the Kennedy assassination, the violence in our nation and the necessity of legislation "to bring the insane traffic of guns to a halt." Other television programs covered the traffic in guns and their ease of acquisition. On the first day of the trial, Robert F. Kennedy died from his gun wounds, and his body was flown to New York City to lie in state. During the second day of trial, the body of Robert F. Kennedy laid in state in St. Patrick's Cathedral as thousands of mourners passed his coffin.

On Saturday morning, June 8, 1968, while this case was recessed, a Requiem mass was held in New York, at which Senator Edward Kennedy delivered an emotional and stirring eulogy to his brother. Following the mass, the body of the late Senator was moved in a special, black draped train to Washington for burial at Arlington National Cemetery, late that evening. On that same day, James Earl Ray, the alleged assassin of Martin Luther King was apprehended in London, England.

The events concerning the Kennedy tragedy, the capture of the alleged assassin of Martin Luther King, the stepped-up campaign for new gun control legislation and the commission of additional crimes of violence involving guns in the District of Columbia received widespread coverage during the time of this trial in the mass media of metropolitan Washington, including The Washington Post, The News and The Evening Star newspapers; WRC/NBC, WTTG, WMAL/ABC and WTOP/CBS television broadcasting stations and practically all radio broadcasting stations.

The Supreme Court most recently considered the question of the effect of prejudicial publicity before and during trial in Rideau v. Louisiana,[1] Estes v. Texas,[2] and Sheppard v. Maxwell.[3] In those cases, the Court held that

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1/ 373 U.S. 723, 10 L.ed 2d 663, 83 S.Ct. 1417 (1963)
2/ 381 U.S. 532, 14 L.ed 2d 543, 85 S.Ct. 1628 (1965)
3/ 384 U.S. 333, 16 L.ed 2d 600, 86 S.Ct. 1507 (1966)

prejudicial publicity concerning a defendant and his trial, inherently denies the defendant a fair trial, in violation of the due process clause of the Fourteenth Amendment, even without a showing of prejudice or a demonstration of the nexus between the publicity and the trial. Although the rule established in such cases evolved under circumstances in which the prejudicial publicity concerned a defendant and his trial, the substance of the rationale of the cases supports the proposition that any form of publicity which prejudices or tends to prejudice the right of a defendant to a fair trial, inherently denies such defendant of due process under the Fifth or Fourteenth Amendments and a trial by an impartial jury guaranteed by the Sixth Amendment. This proposition specifically is supported in the Sheppard Case, in which Mr. Justice Clark stated:

> "....Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty in effacing publicity from the minds of jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances....."1/

It is recognized that there always exists a general indignation in our society concerning the commission of a crime, and particularly a crime of violence. Appellant does not contend that a general indignation toward crime generally, or a specific crime, constitutes a sufficiently prejudicial atmosphere to preclude a fair trial. Appellant does contend, however, that contemporaneous and massive publicity concerning the unlawful

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1/ 384 U.S. at 362

and violent use of firearms, has the effect of creating a greatly inflammatory atmosphere, precluding a fair trial of an accused charged with the offense of carrying a dangerous weapon.

It is important to consider that the jury in this case was not sequestered. During the first two days of trial, the jurors were permitted to return to their homes where they were likely to be exposed to the events surrounding the assassination of Senator Kennedy, by television, radio and newspaper. At least one juror was observed in court with a copy of the Washington Post. (Tr. 7-4) On the weekend preceding the final day of trial, the jurors literally became a captive audience to the events involved in the funeral rites. Most commercial establishments were closed and all programs on local television stations were preempted during almost the entire day by special reports of the funeral.

In view of the pervasive prejudicial publicity creating an inflammatory atmosphere during trial, appellant submits that the trial court erred in denying a continuance and/or denying appellant's motion for a vior dire of the jury. While it is true that the trial court admonished the jury in general terms regarding the events which were occurring (Tr. 6-64, 7-79), and reminded the jury of its obligation to consider only the facts in the case at the close of the trial, (Tr. 10-326, 10-327) such instructions cannot be construed to be curative. Once the jury has been exposed to improper influence, its ability to act fairly and impartially is suspect. In Bruton v. United States,[1/]

1/ --U.S.--, 20 L.ed 2d 476, 88 S.Ct. (1968)

the Supreme Court commented on the effectiveness of a trial judge's instructions to a jury, wherein Mr. Justice Brennan stated:

> "It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless, as recognized in Jackson v. Denno,[1] supra, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." [2]

Appellant submits that the pervasive prejudicial publicity in the present case, and the probability that the jury did not or could not follow the trial judge's instructions to disregard such publicity, denied Blyther the protection of the Fifth and Sixth Amendments.

II. The joinder of defendants was initially improper and prejudicial to appellant Blyther.

Rule 8(b)[3] provides that two or more defendants may be charged in the same indictment if they are alleged to have participated in the same act or transaction constituting an offense. Rule 14[4] provides that if it appears a defendant is prejudiced by a joinder of defendants for trial, a court may grant a severance of defendants or provide whatever other relief justice requires. Appellant contends his joinder with

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1/ 378 U.S. 368, 12 L.ed 2d 908, 84 S.Ct. 1774 (1964)
2/ 20 L.ed 2d at 485
3/ Fed. Rule Crim. Proc. 8(b), 18 U.S.C.A.
4/ Red. Rule Crim. Proc. 14, 18 U.S.C.A.

Emanuel Clemmons for trial was improper ab initio and prejudicial in view of the trial proceedings.

Appellant Blyther and Emanuel Clemmons each were charged with the offense of carrying a dangerous weapon without a license.[1] The alleged offenses of the two defendants may be construed as contemporaneous similar acts but not the "same act or transaction" within the meaning of Rule 8(b). Under the circumstances of this case the alleged offense of carrying a dangerous weapon without a license cannot be construed as an act capable of being performed by more than a single individual, or a transaction capable of involving more than one individual.

In District of Columbia v. Hunt,[2] this Court, confronted with the question of the propriety in the consolidation of three defendants for trial, each charged with the offense of vagrancy, recognized that "joinder is permitted only if the defendants are alleged to have participated in the same act or transaction . . . . constituting an offense . . . ."[3] There, this Court found that the similar acts of vagrancy of the defendants were not subject to joinder.[4] The offense of carrying a dangerous weapon without a license is similar to the offense of vagrancy in the sense that both offenses are personal in nature. It thus is submitted that the joinder in this action was improper ab initio as it was in the Hunt case.

1/ 22 D.C. Code 3204
2/ 47 A.2d 783, 163 F.2d 833 (1947)
3/ 163 F.2d at 835
4/ Id.

The necessity of severance of defendants under Rule 14 is equally obvious from the prejudice to the rights of Blyther which developed in the course of the joint trial. That Blyther was prejudiced in being tried jointly with Emanuel Clemmons is apparent, in that 1) Blyther may have subpoenaed Emanuel Clemmons as a witness in his defense had separate trials been conducted and Clemmons was tried first, 2) the overwhelming evidence against Emanuel Clemmons was siphoned off and imposed on Blyther, 3) Blyther was tainted with effect of Clemmons electing not to testify (Tr. 7-74 to 7-78) conduct looked upon with disfavor by juries, 4) the jury was clearly confused as evidenced by the jury's note to the trial court, (Tr. 10-333) and 5) the trial judge's ruling on Blyther's motion for judgment of acquittal was influenced by his apparent and erroneous (Tr. 10-337) belief that Blyther was implicated in an armed robbery with Emanuel Clemmons. (Tr. 7-23).

Traditionally, the courts have regarded the court's instructions to the jury, the selectivity in a jury's verdict, the presence of overwhelming evidence of guilt on the record, or the imposition of concurrent sentences as a cure for prejudicial joinder.[1/] It is submitted, however, that none of such doctrines are appropriate or applicable here. Cure by instructions to the jury is deemed insufficient in view of Bruton v. United States.[2/] Cure by a showing of selectivity in the jury's verdict has been rejected by this Court.[3/] The

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1/ 74 Yale Law Journal 953
2/ --U.S.--, 20 L.ed 476, 88 S.Ct. - (1968)
3/ Cross v. United States, 118 U.S.App.D.C.324, 335 F. 2d 987 (1964)

presence of overwhelming guilt and the imposition of concurrent sentences obviously are not applicable in this case. Appellant thus contends that the joinder of defendants in this action prejudiced substantial rights [1] of Blyther, and that such prejudice was not effectively cured.

III. The arrest of Blyther and Emanuel Clemmons and the search and seizure following the arrest were unlawful.

The record shows clearly that when Officer Neer first observed Blyther and Emanuel Clemmons, they were sitting in a parked vehicle in an alley. (Tr. 6-25) Within thirty to sixty seconds of the time he arrived on the scene (Tr. 6-39) he approached the driver's side of the vehicle. (Tr.6-26) When he arrived on the driver's side of the parked vehicle, he observed the door beginning to open, (Tr. 6-26) although no portion of the body of the occupant of the driver's seat was out of the vehicle. (Tr. 6-47) At this point Officer Neer grabbed the door on the driver's side of the vehicle (Tr. 6-27) to prevent the occupant from leaving. (Tr. 6-27, 6-60)

Officer Neer further testified that after he grabbed the left door of the parked vehicle, he opened the door, exposing a revolver at the feet of Emanuel Clemmons. (Tr.6-27, 6-48, 6-51) He then drew his service revolver and ordered appellant Blyther and Emanuel Clemmons out of the vehicle. (Tr. 6-46, 6-49)

1/ Kotteakos v. United States, 328 U.S. 750, 90 L.ed 1557, 66 S.Ct.1239 (1946); Schaffer v. United States, 362 U.S. 511, 4 L.ed 2d 921, 80 S.Ct.945 (1960).

In Henry v. United States, [1] FBI agents investigating a theft of whiskey, had information concerning defendant's implication in certain shipments. They observed the defendant drive his car into an alley and stop, load some cartons in his car and then drive off. The agents were unable to follow the defendant's car but later found it parked. They then observed the defendant get into the car, drive to the same alley, load some more cartons into the car and then drive away. At that point, the agents followed and stopped the defendant's car. A search of the defendant's car revealed that the cartons being transported contained stolen radios.

The Supreme Court in Henry held that the arrest of the defendant was complete at the time the FBI agents interrupted the defendant and his companion and restricted their liberty of movement. [2] With the point of arrest thus established, the Court proceeded to state it was then necessary to determine whether at or before the time of the arrest, the agents had reasonable cause to believe that a crime had been committed. [3] It further was stated by the Court that an arrest is not justified by what a subsequent search discloses, citing Johnson v. United States. [5] In determining

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1/ 361 U.S. 98, 4 L.ed 2d 134, 80 S.Ct. 168 (1959)
2/ 361 U.S. at 139
3/ Id.
4/ Id.
5/ 333 U.S. 10, 92 L.ed 436, 68 S.Ct. 367 (1948)

whether there was reasonable cause for an arrest, the Court considered the agents' information concerning the defendant's implication in certain shipments, and their observance of the conduct of the defendant for a considerable period of time preceding the arrest. It found, however, that there was no reasonable or probable cause and that the arrest was unlawful.[1/]

Appellant contends that the arrest of Blyther and Emanuel Clemmons occurred at the time Officer Neer grabbed the door handle on the left side of the parked vehicle in which both were sitting, and restricted the liberty of movement of Emanuel Clemmons. It further is submitted that since the arrest cannot be justified by the weapons and ammunition found during the search following the arrest, it was necessary for Officer Neer to have reasonable or probable cause to make the arrest. In this respect, there is no evidence in the record to support reasonable or probable cause for the arrest.

Appellant thus contends that the arrest of appellant and Emanuel Clemmons and the search following such arrest were unlawful, in violation of the Fourth and Fifth Amendments.

1/ 361 U.S. at 139

IV. The trial court erred in instructing the jury that the officer involved in the arrest of appellant Blyther and Emanuel Clemmons acted entirely properly and that there was no evidence of improper inquiry or unnecessary force.

In Querica v. United States[1] the trial judge informed the jury that the defendant's testimony was a lie except when it agreed with the Government's testimony because the defendant wiped his hands during his testimony. Subsequently, the jury returned a verdict of guilty. In reversing, the Supreme Court held that a trial judge may analyze and dissect the evidence, but he may not distort it or add to it.[2] The Court further held that since the influence of the trial judge on the jury is necessarily and properly of great weight, and the trial judge's lightest word or intimation is received with deference, and may prove controlling, the trial judge has a duty to use great care that an expression of opinion upon the evidence should be so given as not to mislead, and especially that it should not be one-sided.[3]

In the present case there is conflicting testimony in the record concerning appellant Blyther's location in the parked vehicle when Officer Neer arrived in the alley in which the vehicle was located. Officer Neer testified that when he first observed Blyther, he was sitting in the middle of the front seat of the vehicle, (Tr. 6-38) and that when he

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1/ 289 U.S. 466, 77 L.ed 1321, 53 S.Ct. 698 (1933)
2/ 289 U.S. at 470
3/ Id.

subsequently searched the vehicle he found a revolver at the feet of Blyther. (Tr. 6-40) Blyther testified that when Officer Neer arrived on the scene, he was sitting on the rear seat of the vehicle. (Tr. 7-54)

The trial judge instructed the jury in this case that the police officers including Officer Neer, were acting entirely properly within their official duties, and there was no evidence in this case which indicated the police were inquiring into matters not their proper concern in the public interest or making any unnecessary or inappropriate use of force. (Tr. 10-329) In view of the patently unlawful arrest and search by Officer Neer[1] and the conflict in the testimony of Officer Neer and appellant Blyther on a vital point, it is submitted that the trial judge in his charge to the jury, breeched the duty imposed upon him by Querica.[2] The import of the charge obviously is to enhance the creditability of Officer Neer.

The circumstances of the present case, in this respect, are similar to the circumstances in Harding v. United States.[3] There, a conflict in testimony arose between the defendant and a secret service agent testifying for the Government. In his charge to the jury, the trial judge stated that the testimony of the secret service agent had not been impeached and that the jury could rely upon his testimony entirely.[4] In reversing, the

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1/ Supra, Pg. 21
2/ 289 U.S. 466
3/ 335 F.2d 515 (9 Cir., 1964)
4/ 335 F.2d at 516

Ninth Circuit held that the comments of the District Court constituted plain error and precluded a fair and dispassionate consideration of the evidence by the Jury. 1/

Similarly, the comments of the trial court in this case constituted plain error, precluding a fair consideration of the evidence by the jury.

V. The trial court erred in not clearly instructing the jury of the requirement of intent to carry, as an element of the offense charged.

During trial, the question arose as to whether the passengers of a Capitol Transit bus could be indicted under 22 D.C. Code 3204 in circumstances where a gun was found on the floor of the bus. (Tr. 7-22) With respect to such question, the Government took the position that there would not be a violation of the statute because the gun would not be convenient to access of all passengers and would not be in the exclusive possession of the passengers. (Tr. 7-22) The Government thus infers and appellant Blyther strongly urges that an essential element of the offense of carrying a dangerous weapon under the statute is the intent to exercise control over the weapon.

If the statute 2/ is considered applicable under circumstances where a person had knowledge of and convenient access to a gun but had no intent to exercise control over the

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1/ 335 F.2d at 518
2/ 22 D.C. Code 3204

gun, such as in circumstances where a passenger boards a Capitol Transit bus and sits near a gun on the floor, which is seen and within easy access, the statute would lack a reasonable nexus between its purpose, i.e., the control of carrying firearms,[1] and its effects. The lack of a reasonable nexus between a statute and its effects renders a statute unreasonable, and the application of an unreasonable statute constitutes a denial of substantive due process.

This Court has held that a defendant's right to have the jury pass on each element of the offense imposes a duty on the trial judge to give proper instructions on each element of the offense charged, even though no request is made by defense counsel for such instructions.[2] In the present case, although the trial judge sought to interpret the meaning of "carrying" under the statute (Tr. 10-325), he omitted instructing the jury that it must find that appellant Blyther must have had the intent to exercise control over at least one of the weapons found in the vehicle.

If intent to exercise control over a weapon is an essential element of the offense of carrying a deadly weapon, then the trial court erred in not so charging the jury. On the other hand, if such intent is not deemed an essential element of the offense charged, the statute is unreasonable and its application in these circumstances constitutes a denial of substantive due process.

1/ Cook v. United States, 107 U.S. App. D.C. 233, 275 F.2d 887 (1960)
2/ Byrd v. United States, 119 U.S. App. D.C. 360, 342 F.2d 939 (1965)

VI. The trial court erred in refusing to grant appellant Blyther's motion for judgment of acquittal.

In Curley v. United States, 1/ this Court stated the rule that if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, a motion for a directed verdict of acquittal must be granted. 2/ Appellant contends that considering the Government's case here in a light most favorable to the Government, there was no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt.

At the close of the Government's case, the evidence showed that when Officer Neer first observed Emanuel Clemmons, Blyther and Rudolph Clemmons, Emanuel Clemmons was sitting in the driver's seat of the vehicle, (Tr. 6-25) Blyther was sitting in the middle of the front seat (Tr. 6-38) and Rudolph Clemmons was standing outside the vehicle by the right door which was open. (Tr. 6-38) The evidence further showed that a revolver was found at the feet of Emanuel Clemmons and another revolver was found on the front floor, five inches from the right door. (Tr. 6-29) The Government's case further established that no weapons or ammunition were found on the persons of Blyther and Rudolph Clemmons. (Tr. 7-8) Furthermore, there is no evidence in the record that the vehicle in which the defendants were

1/ 81 U.S. App. D.C. 389, 160 F.2d 229, (1947)
2/ 160 F.2d at 232

found either was owned or under the control of Blyther, or that Blyther's fingerprints were found on either of the weapons or the ammunition.

Under such circumstances, it would appear that a reasonable mind might fairly conclude that since Blyther was sitting in the middle of the front seat of the vehicle and Rudolph Clemmons was standing near the right door that was open, Rudolph Clemmons may have been sitting in the car also. What other probable reason can there be for appellant Blyther sitting in the middle of the front seat?

In view of the fact that one weapon was positioned at the feet of Emanuel Clemmons and the other weapon was positioned within easy access to Rudolph Clemmons (whether in or out of the vehicle), and the fact that there is no evidence of Blyther's fingerprints on either of the weapons, it would be reasonable to conclude that Emanuel Clemmons and Rudolph Clemmons had exclusive possession and control over the two weapons. Under such circumstances, there was no evidence at the close of the Government's case upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, and accordingly the trial court erred in refusing to grant Blyther's motion for judgment of acquittal.

CONCLUSION

For the foregoing reasons, appellant Elyther respectfully requests that this Court reverse the judgment of the District Court in this case, and that his sentence be vacated.

Respectfully submitted,

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Attorney for Appellant
(Appointed by This Court)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief have been served personally at the office of the United States Attorney, United States District Courthouse, Washington, D.C., this 14th day of March, 1969.

Peter N. Lalos

ADDENDUM

Constitutional Provisions, Statutes and Rules Involved

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 22 of the District of Columbia Code, section 3204, provides:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

Rule 8(b) of the Federal Rules of Criminal Procedure provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 of the Federal Rules of Criminal Procedure provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.